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No. 88-444

In The

Supreme Court of the United States

October Term, 1988

ROBERT W. LOTT,

Petitioner,

vs.

FIREMEN AND POLICEMEN'S PENSION FUND BOARD OF TRUSTEES OF SAN ANTONIO, TEXAS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF TEXAS

HARVEY L. HARDY
HARDY SCHWARTZMAN BAHAN
& JACOBSON, P.C.
400 GPM South Tower
800 N.W. Loop 410
San Antonio, Texas 78216
Phone: (512) 341-1333

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TO THE HONORABLE SUPREME COURT:

The Respondent, Firemen and Policemen's Pension Fund Board of Trustees of San Antonio, Texas, respectfully requests that this Court deny the Petition for a Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

State Statute involved is Article 6243f, § 7(c), Vernon's Annotated Texas Statutes, which appears in Petitioner's Appendix on page 29a.

The Federal Statute involved is 38 U.S.C. § 2022 which appears in Petitioner's Appendix on page 37a.

Petitioner contends that Article 6252-4a, Vernon's Annotated Texas Statutes is involved. Petitioner as Plaintiff in the trial court did not plead this statute nor advert to it at any stage until the contention was made in his reply brief in the Texas Court of Appeals that such statute was tried by consent. This is not true. Article 6252a-4a appears in Petitioner's Appendix beginning at page 30a.

STATEMENT

There are errors and omissions in Petitioner's statement. The second paragraph thereof seeks to give the impression that Petitioner (as Plaintiff in the trial court) only pled the federal statute, 38 U.S.C. § 2021-2024, inclusive, by way of an anticipatory defense. The truth is that Petitioner in his trial pleading (which can be found in his appendix herein at pages 6a and 7a) alleged "that his rights are governed by Title 38, § 2021(a)(b) *et seq.* of the United States Code . . . " and, again, " . . . Plaintiff says that these federal statutes supersede any Texas statutes to the contrary pursuant to the Supremacy Clause of the United States Constitution, Article 1, § 8, Clause 12 which preempts states from enacting legislation limiting or restricting such congressional power. . . ." He then pled,

alternatively, that the federal law made the state law unconstitutional (Petitioner's Appendix 7a).

On page 4 of the Petition, it is pointed out that in its legal conclusions the Court found that Petitioner's suit had but tangential reference to federal law and that Article 6252-4a, Vernon's Annotated Texas Statutes afforded Petitioner a separate independent ground of recovery. What is not said is that the latter statute was not plead by Petitioner in the trial court. It was not pled until he filed his Appellee's Brief. No reference is made to the fact that the trial court's conclusions also included the following statements: "5. The Plaintiff's right to contribute funds for the four (4) years while on active duty with the United States Air Force is *controlled* and *governed* by the provisions of 38 U.S.C. 2021, *et seq.*" and "6. This congressional act evidences a uniform scheme to residents of all of the 50 states of the United States who may enter its armed forces, and consequently, these federal benefits override and supersede the provisions of § 7(c) of Article 6243f, V.A.C.S. under Article 6, Clause 2, the United States Constitution, more commonly known as the Supremacy Clause." (Emphasis added.)

Under Texas law a plea to the jurisdiction can be filed at any stage of the proceedings in any lawsuit where such a plea is relevant. This is elementary.

The last paragraph of Petitioner's statement is wholly erroneous in claiming that the enforcement provisions found in 38 U.S.C. 2022 "was pled only to dispel the defense which was actually asserted by the Respondent that Petitioner's volunteering for active duty deprived him of the right to contribute to the fund." As shown

above, the allegation was actually that the federal law preempted state law and that his case was governed by federal law, all asserted in affirmative terms and not by way of defense.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Petition should be denied for the following reasons:

1. Petitioner's claim is wholly dependent on the provisions of 38 U.S.C. § 2021-2024, inclusive, under his pleadings and this federal statute confers exclusive jurisdiction on the United States District Courts.

2. The rule is well established by this Court that if a case is filed in state court as to which federal jurisdiction is exclusive it cannot be removed to federal court. It must be dismissed in state court and then be refiled by the Plaintiff in federal court.

3. The Texas statute granting veteran's benefits was not pled or even discussed or cited in the trial court. Petitioner as Plaintiff did not rely on same and Respondent as Defendant had no notice that it was involved nor any opportunity to defend and meet any issue arising out of such statute (Article 6252-4a, V.A.T.S.).

4. Petitioner (as Plaintiff) pled in the trial court that the federal law preempted state law on this subject and the trial court so concluded in its findings.

We will briefly discuss each of these points in turn.

1. FEDERAL COURT JURISDICTION IS EXCLUSIVE

Title 38 U.S.C. § 2022 "Enforcement Procedures" solely empowers the District Court of the United States to enforce these provisions and also provides that the veteran can require, without compensation, the services of the United States attorney to enforce his rights in such court. There is no ambiguity in this section.

In the case of *Kidder v. Eastern Air Lines,* 469 F. Supp. 1060 (U.S.D.C., S.D.Fla. 1978), the court held that " . . . the federal courts are the *exclusive forum* for the vindication of these distinctively federal rights (McKinney v. M.K.T.Ry. Co., supra, 357 U.S. at 268, 78 S.Ct. 1222)." (Emphasis supplied.) (At page 1065 of 469 F.Supp.)

This court in the case of *McKinney v. M.K.T.Ry. Co.,* supra, 357 U.S. 265, 2 L.Ed.2d 1305, 78 S.Ct. 1222 (1958), is authority both for the proposition that this cause of action arises under the laws of the United States and that the federal courts have exclusive jurisdiction. See pages 269-270 of 357 U.S. or page 1309 of 2 L.Ed.2d.

The U. S. Supreme Court (at this page) referred to the rights asserted here as "these distinctively federal rights" and pointed out that the District Court (meaning the United States District Court) "has jurisdiction."

The opinion goes on to say that "the statutory scheme contemplates the speedy vindication of the veteran's rights by a suit brought immediately in the District Court . . . "

Petitioner has never presented a single case to the contrary, state or federal, wherein state jurisdiction over such a case was exercised or upheld.

2. THIS CASE COULD NOT HAVE BEEN REMOVED TO FEDERAL COURT

Petitioner's point that it was up to Respondent to remove the case from the state court to the federal court if it wished to do so is completely without merit because if the federal court had exclusive jurisdiction, it could not be removed under the opinions of this court and if the state court had jurisdiction there was not ground for removal. In either event, Petitioner's point in this regard is absurd.

The leading case is *Lambert Run Coal Co. v. B. & O. Ry. Co.*, 258 U.S. 577, 42 S.Ct. 349, 66 L.Ed. 671 (1922). This court speaking through Mr. Justice Brandeis, said: "The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject matter or the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction."

See *Lambert Run Coal Co. v. B. & O. Ry. Co.*, 258 U.S. 577, 42 S.Ct. 349, 66 L.Ed. 671 (1922), supra; *Kelly, Atty. Gen. vs. Carr, et al.*, 691 F.2d 800 (6th Cir., 1980) at page 805; *Billy Jack for Her, Inc. vs. New York Coat, Suit, Dress & Allied Workers Union, et al.*, 511 F. Supp. 1180 (U.S.D.C.S.D.N.Y. 1981) at page 1188; *Gutherie vs. Dow Chemical Co.*, 445 F. Supp. 311 (U.S.D.C.S.D.TX, 1978); and *Wamp v. Chattanooga Housing Authority*, 527 F.2d 595 (6th Cir., 1975) at page 597.

3. ARTICLE 6252-4a WAS NOT PLED, CITED, DISCUSSED OR ARGUED IN THE TRIAL COURT

Petitioner's suit was one to enforce the federal veteran's act and the state act was not pled.

As stated above, Petitioner never did plead the state act, Article 6252-4a, V.A.T.S., and it was not cited or argued before the trial court nor did Respondent have any kind of notice that such statute was being relied on or invoked.

Petitioner's trial pleading, "Plaintiff's First Amended Original Petition," is to be found in Petitioner's Appendix beginning at page 3a through page 9a. It will be seen that Article 6252-4a is never pled or mentioned in said pleading. Respondent did not have an opportunity to prepare a response to this act or present a defense thereto. There was no trial by consent as to such statute because Respondent had no notice of it and was completely unaware that Petitioner was relying on same. It was injected into this case after the trial had been concluded.

4. PETITIONER PLED PREEMPTION OF STATE LAW BY THE FEDERAL STATUTE AND NOT OTHERWISE

Here again we refer the Court to Petitioner's trial pleading beginning at page 3a of his Appendix. Note paragraph VI at page 6a of the Appendix wherein the following is to be read: "Pleading further, Plaintiff says that these federal statutes supersede any Texas statutes to the contrary under the Supremacy Clause of the United States Constitution . . . " Petitioner stood four square on his Title 38 rights as shown by his pleading, Paragraph V on page 6a of his Appendix wherein he states "that his

rights are governed by Title 38 § 2021(a)(b) *et seq.* of the United States Code . . . "

The simple truth is that this case was brought in state court in order to recover attorney's fees under the Texas Declaratory Judgment Act. Petitioner, in effect, concedes this in the paragraph beginning at the bottom of page 10 of his petition. Title 38 U.S.C. § 2022 provided that Petitioner could have filed his claim in U. S. District Court (as the statute requires) through the United States attorney without any expense or cost.

CONCLUSION

In conclusion Respondent points out that it pled and argued in the courts below many points of defense in addition to its plea to the jurisdiction. Neither the Court of Appeals nor the Texas Supreme Court reached any of these well pled issues which were supported in the record, inasmuch as there was no jurisdiction.

We submit that the federal statute makes it plain that the assertion of these veteran's rights under Title 38 must be enforced in the U. S. District Court. The petition for Writ of Certiorari should be denied.

Respectfully submitted,

HARVEY L. HARDY, SB# 08986000
HARDY SCHWARTZMAN BAHAN
& JACOBSON, P.C.
400 GPM South Tower
800 N.W. Loop 410
San Antonio, Texas 78216
Phone: (512) 341-1333

Attorney for Respondent